IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

THE CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION,

Petitioner,

vs.

JENNIE M. SUNDQUIST, ADMINISTRATRIX OF THE ESTATE OF ANTON E. SUNDQUIST, DECEASED,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court below is reported in 119 Fed. (2d), page 955. The opinion also appears at page 258 of the transcript of record.

II.

Jurisdiction.

The jurisdiction of this Court is invoked in accordance with Section 240 of the United States Code, as amended (United States Code, Title 28, Section 347).

III.

Statement of the Case.

Our statement of the case appears in the preceding petition under heading I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in refusing to rule that the United States District Court erred in refusing to direct the jury to return a verdict in favor of the defendant, because under all the evidence in the case it appeared as a matter of law that the policies of insurance sued on by the plaintiff had been rendered void by reason of fraud and false swearing on the part of the plaintiff. (Specification 16; Trans. 244.)

2. The Circuit Court of Appeals erred in refusing to follow the ruling the Appellate Court for the Second District of Illinois as to the admissibility of defendant's Exhibit 53, and in affirming the ruling of the Court below, excluding said Exhibit (Specification 10, Trans. 243).

V.

ARGUMENT.

Summary of Argument.

Point A. The Circuit Court of Appeals Misunderstood and Misapplied Soler & Co. v. United Firemen's Insurance Company, 299 U. S. 45.

1. *A False and Fraudulent Statement Made for the Purpose of Procuring a Falsely Excessive Valuation of the Property Lost, Works a Forfeiture of All Claims Under the Policy.*

Kavooras v. *Insurance Company of Illinois*, 167 Ill. App. 220.

Claflin v. *Commonwealth Insurance Company*, 110 U. S. 81.

Hyland v. *Millers National Insurance Company*, 91 Fed. (2d) 735.

Columbian Insurance Company v. *Modern Laundry*, 277 Fed. 355.

2. *There Is a Point Where the Question of Fraud and False Swearing Becomes One of Law and Beyond Which the Insured Cannot Be Heard to Say That His Intent Was Innocent.*

Kavooras v. *Insurance Company of Illinois*, 167 Ill. App. 220.

Butler v. *Security Insurance Company*, 244 Ill. App. 379.

Cuetara Hermanos v. Royal Exchange Assurance, 23 Fed. (2d) 270, certiorari denied 277 U. S. 590.

Moreau v. Palatine Insurance Company, 84 N. H. 422, 151 Atl. 817.

Domagalski v. *Springfield Fire & Marine Insurance Co.*, 218 App. Div. 187, 218 N. Y. S. 164.

Werber Leather Coat Co. Inc. v. *Niagara Fire Ins. Co.*, 254 App. Div. 298, 5 N. Y. S. (2d) 1.

Cooley, Briefs on Insurance, Second Edition (1928), Volume 7, page 5864.

Point B. The Circuit Court of Appeals Was Bound to Follow the Ruling of the Illinois Appellate Court in Sundquist v. Illinois Fire Insurance Company, 305 Ill. App. 160 (Appendix, p. 1) as to the Admissibility of Defendant's Exhibit 53.

It Is Now Settled That Decisions of Intermediate Appellate Courts Are of the Same Binding Effect as Decisions of the Highest Court of the State.

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223.

Six Companies of California v. *Joint Highway District*, 311 U. S. 180.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169.

Point A.

The Circuit Court of Appeals Misunderstood and Misapplied Soler & Co. v. United Firemen's Insurance Company, 299 U. S. 45.

The Circuit Court of Appeals stated in its opinion that the language in the opinion in the case of *Soler* v. *United Firemens Insurance Company*, *supra*, is particularly applicable in the case at bar. We believe that the Circuit Court of Appeals was in error in so regarding the opinion of this Court. The vital point of decision in the *Soler* case was that the verdict of the jury establishing the loss to be an amount far less than that claimed, did not establish

as a matter of law that the insured was guilty of willful overvaluation of the property insured. The question in the instant case is entirely different. The question here is whether the deliberate action of the insured in presenting forged invoices and supporting memoranda concerning the age of the merchandise insured renders the policy void as a matter of law. The instant case does not present a mere question of overvaluation, as the opinion of the Circuit Court of Appeals would indicate, but in fact is a case of deliberate and palpable fraud perpetrated upon the insurer. As is pointed out in the *Soler* case, 299 U. S. 45, at page 50, there may be circumstances under which an inaccurate proof of loss may be presented without "conscious dishonesty," but how can it be said that presenting forged invoices and memoranda and requesting falsely dated invoices from manufacturers is anything but conscious dishonesty? The intention to deceive is here manifest and the instant case is governed by the authorities holding that a fraudulent statement made for the purpose of procuring a falsely excessive valuation of the property lost works a forfeiture of all claims under the policy. *Kavooras* v. *Insurance Company of Illinois*, 167 Ill. App. 220; *Claflin* v. *Commonwealth Insurance Company*, 110 U. S. 81; *Hyland* v. *Millers National Insurance Company*, 91 F. (2d) 735; *Columbian Insurance Company* v. *Modern Laundry*, 277 F. 355. The Illinois courts have likewise held that there is a point where the question of fraud and false swearing becomes one of law and beyond which the insured cannot be heard to say that his intent was innocent. *Kavooras* v. *Insurance Company of Illinois*, 167 Ill. App. 220; *Butler* v. *Security Insurance Company*, 244 Ill. App. 379. See also *Cuetara Hermanos* v. *Royal Exchange Assurance*, 23 Fed. (2) 270; *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 App. Div. 187, 218 N. Y. S. 164; *Werber Leather Coat Co., Inc.* v. *Niagara Fire Ins. Co.*, 254 App. Div. 298, 5 N. Y. S. (2d) 1; *Moreau*

v. *Palatine Insurance Company*, 84 N. H. 422, 151 Atl. 817; Cooley, Briefs on Insurance, Second Edition (1928) Vol. 7, page 5864.

In *Kavooras* v. *Insurance Company of Illinois*, 167 Ill. App. 220, the Appellate Court in reversing a judgment in favor of the insured and holding him guilty of fraud and false swearing as a matter of law, said (pages 228-229, 229):

> "We think the over-insurance and the other circumstances of the case completely justify the conclusion that Kavooras, both in the making of the proofs of loss and in his testimony at the trial was guilty of wilful false swearing. * * *
>
> "Some of the authorities bearing on the subject are: *Va. Fire & Marine Ins. Co.* v. *Vaughn*, 14 S. E. 754; *Clafflin* v. *Insurance Co.*, 110 U. S. 81; *Gies* v. *Bechtner*, 12 Minn. 183."

It is to be noted that the Court cited *Claflin* v. *Commonwealth Insurance Company*, 110 U. S. 81, in support of the conclusion reached.

The recent case of *Werber Leather Coat Co., Inc.* v. *Niagara Fire Ins. Co.*, 254 App. Div. 298, 5 N. Y. S. (2d) 1, illustrates the distinction between the Soler case and the case at bar. In that case, just as in the case at bar, the insured was guilty of falsifying invoices. The jury returned a verdict in his favor. The judgment below was held erroneous as a matter of law. The Court said (p. 3, 5 N. Y. S. (2d)):

> "If there is wilful misrepresentation of a material fact, or concealment thereof, on the part of the insured in the proof of loss, examination pursuant to the policy, or otherwise, the policy is void in accordance with its terms. *Claflin* v. *Commonwealth Insurance Co.*, 110 U. S. 81, 85, 3 St. Ct. 507, 28 L. Ed. 76; *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 App. Div. 187, 218 N. Y. S. 164; *Kantor Silk Mills, Inc.* v. *Century Insurance Co., Ltd., of Edinburgh, Scotland*, 223 App. Div. 387, 228 N. Y. S. 822, affirmed, without opinion, 253 N. Y. 584, 171 N. E. 793."

The Circuit Court of Appeals, in effect, holds, on the authority of *Soler & Co.* v. *United Firemen's Insurance Company,* 299 U. S. 45, that no matter how palpable the evidence of fraud and false swearing, the question remains one for the jury. We do not believe that the decision warrants such a view, and respectfully submit that the rule laid down in that case should not be extended as it has been by the Circuit Court of Appeals. Where the evidence of fraud is plain and does not admit of an innocent intention, the rule should remain that the insured as a matter of law is to be charged with responsibility for his fraudulent acts.

The Circuit Court of Appeals in its opinion quoted the following from *Sundquist* v. *Hardware Mutual Fire Insurance Co.,* 296 Ill. App. 510 (affirmed 371 Ill. 360):

> "False swearing in a proof of loss in order to avoid the insurance policy must be wilful and with intent to deceive and defraud the insurer."

In the cited case, the forged invoices and memoranda were not involved, as the fact that the invoices had been forged was not discovered until after the trial of that case. That case turned on the question of over-valuation, and on that point must be regarded as parallel to the decision of this Court in *Soler* v. *United Firemen's Insurance Company,* 299 U. S. 45. However, the evidence establishing the fraudulent conduct on the part of the insured in the case at bar goes far beyond that developed in the earlier trial of the companion case. There is here no question of a possible innocent intention. There was a wilful and intentional attempt to deceive the insurers as to the age and value of the pianos in question.

The opinion of the Circuit Court of Appeals refers to plaintiff's contention that the defense manufactured the evidence wherein the age of the merchandise was misstated. No evidence is referred to in support of this

contention, and there is no such evidence. Defendant's Exhibit 6 in Sundquist's own hand, already discussed in detail, (*supra,* page 3), negatives any such contention.

We submit that the apparent misunderstanding of the decision of this Court in *Soler & Co.* v. *United Firemen's Insurance Company,* 299 U. S. 45, calls for a review of the decision in the case at bar.

Point B.

The Circuit Court of Appeals Was Bound to Follow the Ruling of the Illinois Appellate Court in Sundquist v. Illinois Fire Insurance Company, 305 Ill. App. 160 (Appendix, p. 1), as to the Admissibility of Defendant's Exhibit 53.

Prior to the decisions of this Court in the cases of *West* v. *American Telephone and Telegraph Co.,* 311 U. S. 223, *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180, and *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, it had been a much disputed question whether decisions of intermediate Appellate Courts were of the same binding effect under the rule of conformity laid down in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, and subsequent cases, as were decisions of the highest courts of the state. In fact there was controversy among the Judges of the Circuit Court of Appeals for the Seventh Circuit as to the binding effect of such intermediate Appellate decisions. See majority and dissenting opinions in *Damen and Jarvis Building Corporation* v. *Mechanics' Insurance Company,* 83 Fed. (2) 793. Significantly the briefs in the instant case were filed prior to the rendition of the decisions of this Court referred to. We thus have the highly anomolous situation presented of the Appellate Court for

the Second District of Illinois holding the exhibit in question admissible,* while the Circuit Court of Appeals for the Seventh Circuit holds precisely the same exhibit inadmissible. Such a situation surely can not be tolerated under the rule of conformity laid down by this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and the subsequent decisions following that case. The desirability of conformity was further emphasized by the decisions in the three cases above referred to, holding that the decisions of intermediate Appellate Courts were to be entitled to the same degree of finality as decisions of the highest courts of the state. Obviously the purpose of the rule so laid down is to insure conformity as between state and Federal Courts, and to make certain that the Federal Courts will follow and feel themselves bound by decisions from state courts, even though the Federal Courts were to regard such decisions as erroneous and would decline to adopt the same view if the question were at large.

In view of the recent decisions of this Court finally establishing the rule of conformity, it seems hardly necessary for us to belabor the point with further argument as to the law. To sustain a ruling that an exhibit regarded as admissible in the state courts is inadmissible in the Federal Courts is a complete negation of the doctrine of conformity.

The only question remaining is whether the ruling of the Circuit Court of Appeals can be sustained on the ground assigned in the opinion. The Court took the view that the inventory was not admissible, because as the Court stated, the stock had been sold prior to the time of the fire. This is precisely the same argument which was advanced in the *Illinois Fire* case as tending to sustain the ruling of the Court below in that case. The Appellate Court rejected the argument there advanced, and held the exhibit admis-

* See Appendix, page V.

sible. Whether the Appellate Court was right or wrong in its reasoning would not seem open to review by the Circuit Court of Appeals. If conformity means anything, it means the Circuit Court of Appeals is bound to follow the view taken by the Illinois Appellate Court, whether it agrees with it or not, or whether erroneous or not. Furthermore, the view taken by the Circuit Court of Appeals is not borne out by the record. (See discussion, *supra,* page 8.) The record in this case is substantially the same as that in the *Illinois Fire* case, and therefore the Circuit Court of Appeals was required to take the same view as to the admissibility of the exhibit in question, and under the decisions of this Court the Circuit Court of Appeals was not justified in declining to follow the rule as laid down by the Appellate Court for the Second District of Illinois as to the admissibility of the identical exhibit.

Conclusion.

For the reasons hereinabove set forth we respectfully submit that this Court should grant to the petitioner its writ of certiorari, and that upon a full hearing of this cause upon the return of said writ, that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed, with directions to reverse the judgment of the Court below, or in the alternative, with directions to remand the cause to the United States District Court, for the Southern District of Illinois, Northern Division, for a new trial.

Respectfully submitted,

HERBERT W. HIRSH,
Counsel for Petitioner.